Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-1337

MICHELE SINDONA,

Petitioner,

vs.

LAURENCE A. TISCH, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No.

MICHELE SINDONA,

PETITIONER,

V.

LAURENCE A. TISCH, et al.,

RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, Michele Sindona, respectfully prays that a writ of certiorari issue to review the decision and opinion of the United States Court of Appeals for the Second Circuit entered in this case on October 31, 1979.[1]

---

1 The respondents are Laurence A. Tisch ("Tisch"), Lawton General Corporation, Loew's Theatres Inc., Tisch Hotels, Inc., Loew's Corporation and Loew's Hotels, Inc.

OPINIONS BELOW

The decision of the Court of Appeals is reported at 609 F.2d 807. Its opinion, which has not been published, appears as Appendix A hereto. The Court of Appeals affirmed an Order of the United States District Court for the Southern District of New York, Honorable Robert L. Carter, dated June 5, 1979, dismissing this action with prejudice under Rule 37 of the Federal Rules of Civil Procedure for petitioner's failure to comply with the district court's prior discovery order (Memorandum Opinion and Order, dated April 6, 1979, reported at 27 F.R. Serv.2d 404). The district court's June 5 and April 6, 1979 orders appear as Appendices B and C hereto, respectively.

JURISDICTION

The decision of the Court of Appeals for the Second Circuit was entered pursuant to an order dated October 31, 1979. On January 28, 1980, Mr. Justice Marshall signed an order extending the time for filing this petition for certiorari to and including February 29, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether the district court denied petitioner due process of law in concluding that his valid assertion of his self-incrimination privilege during pretrial discovery automatically required dismissal of his action.

STATEMENT OF THE CASE

The petitioner in this proceeding, and the plaintiff below, is Michele Sindona ("Mr. Sindona"), a citizen of the Republic of Italy living in the City of New York. On July 10, 1978, petitioner commenced this action in the United States District Court for the Southern District of

New York. Petitioner alleged that respondents had defrauded him of over $40,000,000 in connection with their sale to Fasco International Holding, S.A. ("Fasco International"), a company which has since been dissolved but which was at the time wholly-owned by petitioner, of 1,000,000 shares of the common stock of Franklin New York Corporation ("FNYC"), the parent holding company of Franklin National Bank ("FNB" or "the Bank"), on July 11, 1972. In October, 1974, FNB was declared insolvent by the Comptroller of the Currency, and FNYC filed a voluntary petition in bankruptcy in the United States District Court for the Southern District of New York. As a consequence, petitioner's stock has become substantially worthless. The jurisdiction of the district court was invoked under Section 27 of the Securities Exchange Act of 1934, as amended (15 U.S.C. § 78aa), 28 U.S.C. §§ 1332(a)(2), 1337, and pendent jurisdiction.

In 1974, petitioner was advised by the United States Attorney for the Southern District of New York that he was a target of a federal grand jury investigating the Bank's collapse. Within a few months after the Bank's failure, numerous civil actions had been commenced by government agencies as well as private parties against petitioner, respondent Tisch and others.

The FDIC, both in its corporate capacity and as receiver of FNB, has commenced two such actions: *Rothman v. Andersen, et al.*, 74 Civ. 894 (E.D.N.Y.),[2] and *FDIC v. Tisch, et al.*, 78 Civ. 1444 (TCP) (E.D.N.Y.). The complaint in the former action charges that petitioner and respondent Tisch, among others, breached various

2 This action has been consolidated for pretrial discovery purposes with numerous other actions involving the failure of FNB under the caption *In re Franklin National Bank Securities Litigation*, M.D.L. No. 196 (JBW) (E.D.N.Y.).

fiduciary duties owed to FNB, thereby causing the Bank's insolvency. The complaint in the latter action charges that Tisch, having obtained material information not available to the public, affected an inflated market value for FNYC stock from 1970 through August 1972. Discovery has been proceeding actively in these cases since 1974 and 1978, respectively.

In the reasonable anticipation that the grand jury investigation and any criminal prosecution resulting therefrom would have long since terminated, and in an attempt to avoid the problems which might result from his inability to submit to discovery, petitioner delayed initiating this action until July 10, 1978, just prior to the expiration of the six-year statute of limitations. The grand jury investigation continued for an unprecedented period of time, and on July 13, 1978, petitioner was named as a unindicted co-conspirator in *United States of America v. Gleason, et al.*, 78 Cr. 522 (TPG) (S.D.N.Y.), which similarly involved the failure of FNB. On January 23, 1979, the jury in that case returned guilty verdicts on all counts against the three defendants.

On November 14, 1978, in an effort to avoid unproductive and time consuming discovery requests, petitioner moved the district court for a protective order temporarily staying discovery against him.[3] On January 8, 1979, the district court granted petitioner a temporary protective

---

3 From the outset petitioner advised both the district court and opposing counsel that as the target of a grand jury investigation he would assert his Fifth Amendment privilege against self-incrimination in response to any related discovery requests. Nevertheless, on October 26, 1978, petitioner produced numerous documents in response to Defendants' First Request For Production of Documents, each of which had previously been ordered produced by the Honorable Dudley B. Bonsal, United States District Judge, in *Securities and Exchange Commission v. Gleason, et al.*, 74 Civ. 4557 (DBB) (S.D.N.Y.). No privilege could then have been claimed with respect to these documents.

order which by its terms was to expire thirty days after the conclusion of the then on-going criminal trial in *United States of America v. Gleason, et al.* (Carter Endorsement of January 8, 1979, copy annexed as Appendix D hereto). Counsel for petitioner anticipated that such a stay would be sufficient to enable the United States Attorney to obtain an indictment or discontinue his investigation and thereby clarify whether petitioner would be prosecuted. When the protective order expired on February 22, 1979, however, the United States Attorney had neither sought an indictment nor discontinued his investigation.

Counsel for petitioner sought an extension of the protective order, which request was denied by the district court. Respondents thereafter noticed petitioner's deposition for March 6, 1979. Petitioner appeared on that date and asserted his Fifth Amendment privilege in response to all questions addressed to the substance of this action.

On March 9, 1979, respondents moved to compel petitioner to submit to discovery and, upon his refusal to comply with a discovery order, for dismissal of the action.

During the pendency of the motion, on March 19, 1979, the grand jury returned an indictment against petitioner (Indictment, *United States of America v. Sindona and Bordoni*, S 75 Cr. 948 (TPG) (S.D.N.Y.) ("the indictment"), charging in ninety-nine counts that he conspired to and did defraud various government ageneies and private corporations and their shareholders through numerous alleged activities from 1972 through 1974 while he was a shareholder and director of FNYC. The indictment also charges that petitioner was involved in various illegal transactions involving FNB and other banks in which he allegedly owned a controlling interest. These activities, it is alleged, caused the failure of FNB and FNYC in October, 1974.

The indictment specifically charges[4] , *inter alia*, that:

> the money used to purchase Sindona's interest in the Franklin N.Y. Corp. and Talcott [National Corporation] was fraudulently and illegally removed from the general deposits of BU [Banca Unione] and BPF [Banca Privata Finanziaria] . . . . (Count I ¶ 35 at 6);
>
> [Mr. Sindona] encouraged unauthorized speculation in the trading of foreign currencies at the FRANKLIN NATIONAL BANK and directed and assisted in the falsification of the books and records of the FRANKLIN NATIONAL BANK. . . . (Count I ¶ 51 at 11);
>
> on or about July 11, 1972, FASCO INTERNATIONAL transferred $5,000,000 to Loew's Theaters, Inc. and Lawton General Corp. as the initial payment for 1,000,000 shares of the FRANKLIN N.Y. CORP. (Count I ¶ 55(b) at 12);
>
> on or about July 20, 1972, FASCO INTERNATIONAL transferred said $35,000,000 to Loew's Theaters, Inc. and Lawton General Corp. in exchange for 1,000,000 shares of the FRANKLIN N.Y. CORP. which represented 21.6% of the outstanding shares. (Count I ¶ 55(e) at 12).

4 The original indictment filed on March 19, 1979, was superseded on January 10, 1980. *United States of America v. Sindona*, S 75 Cr. 948 (TPG) (S.D.N.Y.). Although this superseding indictment reduces the charges against petitioner from ninety-nine to sixty-nine counts, it nevertheless continues to charge petitioner with all those activities intimately related to the issues in this case, including the counts set out herein.

On April 6, 1979, the district court ordered petitioner to submit to discovery or suffer dismissal of this action, denying petitioner's request that discovery against him be stayed pending termination of the criminal proceeding against him (Appendix C, *infra*).

On April 27, 1979, petitioner again appeared for his deposition and again asserted his Fifth Amendment privilege in response to all substantive questions.

On May 1, 1979, respondents moved for dismissal. By Order dated June 5, 1979, the district court dismissed this action with prejudice (Appendix B, *infra*). The Second Circuit affirmed that dismissal by its decision and opinion dated October 31, 1979 (Appendix A, *infra*).

Mr Sindona's trial on the March 19, 1979 indictment began on January 28, 1980 in the Southern District of New York and is still in progress.

REASONS FOR GRANTING THE WRIT

1. *The decision below conflicts with decisions of other courts of appeals as to the propriety of dismissal based on the plaintiff's assertion of his privilege against self-incrimination during pretrial discovery where other less drastic remedies are available.*

Petitioner in this case was required to forego valid causes of action solely because he exercised his constitutional right against self-incrimination.

The district court ordered dismissal of petitioner's claims based on his assertion of his Fifth Amendment

privilege to refuse to answer questions on oral deposition. It never questioned the validity of petitioner's Fifth Amendment claim, and the record clearly shows that the discovery which he refused to permit presented a real and substantial danger of self-incrimination.[5]

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5 The indictment charges petitioner with conduct and activities that are intimately related to, and in some cases identical with, the transactions underlying this action (see pp. 5-7 *supra*). It is therefore inconceivable that petitioner could have proceeded with discovery on his claims in this action without running a substantial risk that the information could have furnished "a link in the chain" of evidence needed to prosecute him on the indictment. *See Hoffman v. United States*, 341 U.S. 479, 486 (1951).

The relationship between the issues raised in the instant case and those charged in the indictment was shown beyond question by the questions asked by respondents of petitioner at his depositions on March 6, 1979 and April 27, 1979:

> Q. What was the source of the $40,000,000 that was the purchase price for the shares of Franklin New York Corporation . . . ?
>
> . . .
>
> Q. Whose $40,000,000 was it?
>
> . . .
>
> Q. Did the $40,000,000 belong to Fasco International Holding, S.A.?

(Deposition Transcript, March 6, 1979 at 6.)

> Q. To whom did the $40,000,000 referred to in Paragraph 11 of your Complaint belong?
>
> . . .
>
> Q. In an indictment that has been handed up by a Grand Jury sitting in this District, it is alleged, as I read the indictment, that at some point in time subsequent to your becoming involved in the affairs of the Franklin corporations, you diverted or caused $15 million to be diverted from Franklin National Bank to some other bank. Did you, in fact, do that?
>
> . . .

(Deposition Transcript, April 27, 1979 at 17, 19.)

In their brief filed with the Second Circuit, respondents frankly conceded that the purpose of the foregoing inquiries was to establish that

In so holding, the district court concluded that a plaintiff's assertion of his privilege against self-incrimination during pretrial discovery automatically requires the dismissal of his claims:

> . . . I hold that since Sindona brought this action and is voluntarily using the court process to assert a right of action against the defendants, he cannot use the Fifth Amendment privilege to bar defendants from access to evidence relevant to their defense. Similarly, plaintiff is not entitled to a stay of discovery because he is under indictment and scheduled to go on trial.

(Appendix C, *infra*, p. A-11).

The Second Circuit affirmed in a brief opinion which concurred in the reasoning of the district court, and also observed that the choice which confronted petitioner, between his self-incrimination privilege and his lawsuit, did not place any "real" burden on the Fifth Amendment (Appendix A, *infra*, p. A-3).

The decision of the Second Circuit in this case is in direct conflict with the decision of the United States Court of Appeals for the Fifth Circuit in *Wehling v. Columbia Broadcasting System*, 608 F.2d 1084 (5th Cir. 1979), decided after the Second Circuit rendered its decision in this case.

---

the consideration for the FNYC stock "had been embezzled by Sindona from two Italian banks" and that the "downfall of Franklin . . . was substantially brought about by Sindona's own wrongful conduct including the diversion from the bank of millions of dollars," matters which are expressly alleged in the government's indictment (Brief of Defendants-Appellees, dated September 21, 1979, at pp. 7-8). Respondents could hardly expect that petitioner would be able to respond to such questions when faced with the pending indictment.

In that case, Carl and Geraldine Wehling, the owners of a number of Texas proprietary and trade schools, filed a libel action alleging that they had been defamed by a television news story appearing on the CBS Evening News. The broadcast stated that Wehling had defrauded his students and the federal government through abuse of federal student loan and grant programs. When CBS sought to take Carl Wehling's pretrial deposition, he invoked his Fifth Amendment privilege against self-incrimination "as to all questions with respect to his operation of the schools." 608 F.2d at 1086.

By refusing to answer all such questions, Wehling "deprived CBS of information concerning the accuracy of its broadcast and thus thwarted discovery at the heart of plaintiff's lawsuit." 608 F.2d at 1086. However, the discovery sought by CBS also related to the subject matter of a pending federal grand jury investigation concerning federally insured student loan programs, and Wehling's assertion of his Fifth Amendment privilege was based on a well-founded fear that he was a target of that investigation. *Id.* Plaintiff did not file suit against CBS until the last day before the statute of limitations ran on his libel claim. 608 F.2d at 1088.

Based on the foregoing facts and its review of the relevant case law, the Fifth Circuit held that the district court had acted impermissibly in dismissing plaintiff's action for failure to submit to discovery:

> We hold that the district court erred in concluding the plaintiff's assertion of his self-incrimination privilege during pretrial discovery automatically required the dismissal of his libel action. First, we find no provision in the federal discovery rules which authorizes a court to impose sanctions on a party who resists discovery by asserting a valid claim of

> privilege. See 8 C. Wright & A. Miller, *Federal Practice and Procedure* § 2018 (1970). . . .
>
> Second, we believe that dismissing a plaintiff's action with prejudice solely because he exercises his privilege against self-incrimination is constitutionally impermissible. Wehling had, in addition to his Fifth Amendment right to silence, a due process right to a judicial determination of his civil action. When the district court ordered Wehling to answer CBS' questions or suffer dismissal, it forced plaintiff to choose between his silence and his lawsuit. The Supreme Court has disapproved of procedures which require a party to surrender one constitutional right in order to assert another. *Simmons v. United States*, 390 U.S. 377, 394, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968). Similarly, the Court has emphasized that a party claiming the Fifth Amendment privilege should suffer no penalty for his silence. . . [citations omitted].

608 F.2d at 1087-88.

In *Wehling*, the Fifth Circuit has followed the decision of the Ninth Circuit in *Campbell v. Gerrans*, 592 F.2d 1054 (9th Cir. 1979), which likewise held that dismissal of an action on a valid exercise of Fifth Amendment rights during pretrial discovery is improper under this Court's decisions:

> In light of the Supreme Court decisions on the Fifth Amendment privilege, a plea based on this privilege in the discovery stage of a civil case cannot automatically be

characterized as 'willful default' resulting in dismissal.

592 F.2d at 1058.

The decisions of the courts below appear to have been based at least in part on the circumstance that petitioner is the plaintiff in this action (Appendix A, *infra*, p. A-3; Appendix C, *infra*, p. A-9). Nevertheless, the district court refused to follow *Justice v. Laudermilch*, 78 F.R.D. 201 (M.D. Pa. 1978), despite its recognition that it "is squarely on point in plaintiff's favor" and is indistinguishable "from the issue under consideration" (Appendix C, *infra*, pp. A-10, A-11); and neither court discussed the cases cited by petitioner in which discovery was stayed against civil defendants pending completion of criminal proceedings against them. *See Dienstag v. Bronsen*, 49 F.R.D. 327 (S.D.N.Y. 1970); *Paul Harrigan & Sons, Inc. v. Enterprise Animal Oil Co.*, 14 F.R.D. 333 (E.D. Pa. 1953); *National Discount Corp. v. Holzbaugh*, 13 F.R.D. 236 (E.D. Mich. 1952).

The Fifth Circuit in *Wehling* expressly addressed this question, and concluded that the plaintiff-defendant distinction is a specious solution to a complex problem and therefore does not satisfy the requirement of due process of law.

First, the court noted that the distinction is simply illogical:

> It is true that, as a voluntary litigant, the civil plaintiff has created the situation which requires him to choose between his silence and his lawsuit. In most cases, however, a party 'voluntarily' becomes a plaintiff only because there is no other means of protecting legal rights.

608 F.2d at 1089 n.10.

More importantly, it does not represent a proper accommodation of the competing constitutional and procedural rights involved. Thus, while it is quite true that the plaintiff should not be permitted to derive any procedural advantage by his silence, the court has available to it procedural alternatives which respect the rights of both parties. 608 F.2d at 1087-88. In *Wehling*, the Fifth Circuit directed the district court to enter a protective order staying discovery until the applicable criminal statute of limitations had run against plaintiff, at which time he could submit to discovery on his claim without fear that the fruits of such discovery would fall into the hands of government prosecutors. At the same time, the court recognized that the stay might work actual prejudice to the defendant. Accordingly, it expressly left open the possibility of subsequent dismissal of plaintiff's action if such prejudice could in fact be demonstrated:

> ...[W]e wish to emphasize that although dismissal of the lawsuit was premature at this stage of the proceeding, the district court is not precluded from dismissing plaintiff's action if circumstances [later] arise which require the use of this drastic remedy. . . . However, prejudice to defendant must be established before any remedies are appropriate.

608 F.2d at 1089.

In its opinion the Second Circuit stated that "plaintiff's right to invoke the Fifth Amendment must be weighed against the injustice to the civil defendants" and further stated that the district court had performed that task (Appendix A, *infra*, pp. A-2, A-3). In fact, however, the district court's order was based solely on its conclusion

that civil defendants have an absolute right of dismissal whenever the plaintiff relies upon his Fifth Amendment privilege in response to relevant discovery requests (Appendix C, *infra*, pp. A-11, A-12). Respondents did not make any factual showing in the district court that a stay of discovery would prejudice their defense of this action. Moreover, since identical issues and transactions are involved in other proceedings which are still pending it is difficult to see how such a showing could be made. (See pp. 3, 4, *supra*).

The decision below is in direct conflict with that of the Fifth Circuit in *Wehling*. It also conflicts in principle with the decision of the Ninth Circuit in *Campbell v. Gerrans*, 592 F.2d 1054 (9th Cir. 1979).

These conflicts justify the grant of certiorari to review the decision below.

2. *The decision below raises significant issues of constitutional law and federal civil procedure.*

The question presented in this case involves important issues of constitutional law and federal civil procedure. As set forth more fully below, those issues are, first, whether a valid claim of privilege can be punished as a violation of the federal discovery rules and a complaint dismissed on that basis and, second, whether dismissing a plaintiff's action solely because he exercises his Fifth Amendment privilege during pretrial discovery is constitutionally permissible.

The first issue in this case concerns the path which a district court may follow in dealing with a failure to make discovery which is protected by a valid claim of privilege. The district court rested its power to dismiss petitioner's complaint on Rule 37 of the Federal Rules of Civil Procedure, punishing his refusal to submit to discovery on a

valid exercise of his Fifth Amendment rights as a violation of its prior discovery order:

> . . . A reading of the deposition conclusively establishes that each of the questions put were germane and relevant for the purpose of defendants' pre-trial discovery, and as stated in the memorandum of April 6, plaintiff is required to respond to all such questions. He has no Fifth Amendment protection shielding him from the penalties which may be imposed under Rule 37, F. R. Civ. P. against a recalcitrant party.

(Carter Endorsement of May 24, 1979, Appendix E hereto, at p. A-16).

Clearly, the district court was wrong to proceed as it did. The federal discovery rules do not reach information which is privileged, and thus do not permit the imposition of discovery sanctions in the teeth of a valid claim of privilege. The issue of relevancy is beside the point. *See Hickman v. Taylor*, 329 U.S. 495, 508 (1947).

In dealing with this situation, a district court must therefore draw upon the general equity powers of a federal court. In that context, it is clear that dismissal of a plaintiff's complaint where his refusal to make discovery is based on a valid claim of privilege can only be justified where "other, less burdensome, remedies would be . . . ineffective . . . ." *Wehling v. Columbia Broadcasting System*, 608 F.2d at 1088.

The failure of procedure in this case has been compounded by a basic deprivation of due process. Thus, the courts below believed that petitioner should be required to forego his due process right to a judicial hearing of his civil case based solely on his valid exercise of his Fifth

Amendment privilege against self-incrimination during pretrial discovery. No injustice or procedural unfairness to the respondents was shown. Competing constitutional and procedural rights require careful accommodation if due process is to be realized. *See Wehling v. Columbia Broadcasting System, supra.* This has long been the teaching of this Court's decisions. *See, e.g., Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197, 209 (1958); *Spevack v. Klein*, 385 U.S. 511 (1967); *United States v. Kordel*, 397 U.S. 1, 9 (1970) (dictum).

Petitioner has been deprived of all opportunity to litigate his claims simply because of his valid assertion of his Fifth Amendment privilege. On the other hand, respondents have obtained a windfall judgment in their favor without any factual showing on their part that a stay of discovery would have compromised their defense in any way.

The conflict between the Second and Fifth Circuits over these fundamental constitutional issues, and the evident injustice of the decision below, demonstrate that review by this Court is warranted.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 31st day of October, one thousand nine hundred and seventy-nine.

Present:

HON. LEONARD P. MOORE,
HON. WILLIAM H. TIMBERS,
HON. ELLSWORTH A. VAN GRAAFEILAND,
Circuit Judges,

MICHELE SINDONA,

Plaintiff-Appellant,

v.

LAURENCE A. TISCH, Civil 79-7458
LAWTON GENERAL CORPORATION,
LOEW'S THEATRES INC.,
TISCH HOTELS, INC.,
LOEW'S CORPORATION,
LOEW'S HOTELS, INC.,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the

Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed substantially for the reasons set forth in Judge Carter's opinion of April 6, 1979 and order of June 5, 1979.

Plaintiff sued defendant under Rule 10b-5. Defendant sought to take plaintiff's deposition. Plaintiff refused to answer questions, pleading the Fifth Amendment. The district court dismissed the action.

On appeal, the issues are:

(1) Did the dismissal deny plaintiff due process of law by burdening his exercise of the Fifth Amendment?

(2) Even if the dismissal did not deprive plaintiff of his constitutional rights, was it nevertheless an abuse of discretion?

(3) Did the court abuse its discretion by denying plaintiff a temporary stay of discovery?

We recognize that the exercise of the Fifth Amendment privilege may not be made "costly." But that does not mean that a plaintiff may use his privilege against self-incrimination as a sword to thwart a civil defendant's right to discovery by systematically refusing to answer any questions of substance at his deposition.

In the instant case, plaintiff's right to invoke the Fifth Amendment must be weighed against the injustice to the civil defendants. In that regard this case is distinguishable

from recent Supreme Court decisions guaranteeing the right to invoke the Fifth Amendment without penalty. *See Spevack v. Klein*, 385 U.S. 511 (1967); *Garrity v. New Jersey*, 385 U.S. 493 (1967); *Lefkowitz v. Cunningham*, 431 U.S. 801 (1977). In view of the fact that plaintiff Sindona refused to answer any substantive questions during discovery, we hold that the district court correctly concluded that the balance of justice here tipped in favor of protecting the civil defendants. Sindona never was compelled to waive his Fifth Amendment privilege. He merely was required to choose between exercising his privilege and foregoing use of the courts as a sword against defendants, on the one hand, or, on the other hand, using the court system and complying with its procedures. Such a choice does not place any real "burden" on the Fifth Amendment.

We hold that the district court did not abuse its discretion in either denying Sindona's motion for a stay of discovery procedures or dismissing the complaint. Again, the court weighed the possible injustice to the civil defendants against plaintiff's need for protection, and decided that the scales tipped in defendants' favor. The court had sound reasons for acting as it did.

Affirmed.

LEONARD P. MOORE
WILLIAM H. TIMBERS
ELLSWORTH A. VAN GRAAFEILAND
Circuit Judges

APPENDIX B

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

MICHELE SINDONA,

Plaintiff,

-against-

LAURENCE A. TISCH,
LAWTON GENERAL CORPORATION,
LOEW'S THEATRES, INC.,
TISCH HOTELS, INC.,
LOEW'S CORPORATION,
LOEW'S HOTELS, INC.,

Defendants.

78 Civ. 3102 (RLC)
ORDER AND JUDGMENT

This Court, by its Endorsement dated May 24, 1979, having determined (1) that plaintiff has failed to obey the Order of the Court herein dated April 6, 1979 by continuing to refuse to produce documents sought by defendants, refusing to answer each question put to him by defendants upon deposition, and stating, through counsel, that he would continue to refuse to respond to all questions put at his deposition, (2) that each of the questions put to plaintiff at his deposition was germane and relevant for the purpose of defendants' pre-trial discovery, and (3) that, for the reasons stated in the Court's Memorandum Opinion and Order of April 6, 1979, defendants are entitled under Rule 37 of the Federal Rules of Civil Procedure to an Order dismissing this action with prejudice, it is hereby

ORDERED, ADJUDGED AND DECREED that this action is dismissed with prejudice and that defendants shall recover from plaintiff the costs and disbursements of this action.

Dated: New York, New York
June 5, 1979

Robert L. Carter
United States District Judge

Judgment Entered 6/7/79

APPENDIX C
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MICHELE SINDONA,

Plaintiff,

-against-

LAURENCE A. TISCH, 78 Civ. 3102
LAWTON GENERAL CORPORATION, (RLC)
LOEW'S THEATRES INC.,
TISCH HOTELS, INC.,
LOEW'S CORPORATION,
LOEW'S HOTELS, INC.,

Defendants.

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CARTER, D.J.

OPINION

On July 10, 1978, plaintiff Michele Sindona filed the instant action alleging violations by defendants of Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), Rule 10b-5, 15 C.F.R. § 240.10b-5, promulgated thereunder and common law fraud. The complaint alleges that on July 11, 1972, plaintiff acting through Fasco International Holding, S.A., a Luxembourg corporation, entered into a contract with Loew's Theatres, Inc. and Lawton General Corp., defendants herein, for the purchase of one million shares of the common stock of Franklin New York Corp. ("FNY") at a price of $40 per share; that in connection with the purchase defendants were guilty of various material misrepresentations and fraudulent omissions. Plaintiff alleges that he relied on defendants' representations and that had he been advised of the true facts, which defendants knew at the time of the sale, he would not have made the purchase in question or, alternatively would have bought the stock at a lower price. Allegedly due to the undisclosed conditions present before and subsequent to the sale, the market price of the purchased stock had steadily declined until Franklin National Bank ("FNB") was placed in bankruptcy on October 8, 1974. Sindona seeks damages in excess of 40 million dollars.

On September 8, 1978, defendants served on plaintiff a notice of deposition and a first request for the production of documents. On November 14, 1978, plaintiff moved for a protective order seeking to stay all discovery against him for 90 days. Knowing that he was the object of a criminal investigation that had not yet culminated in an indictment, Sindona argued that it would be impossible for him to intelligently exercise his Fifth Amendment privilege during the deposition. In the application it was alleged that *United States v. Gleason*, a criminal trial (78 Cr.522) then about to proceed before Judge Griesa of this court, involved FNB and FNY, and that Sindona was named therein as an

unindicted co-conspirator. Plaintiff alleged that that trial would probably determine the status of the criminal investigation involving him. Over defendants' objection, the court on January 8, 1979, granted the stay but limited its duration to 90 days from the date of the order or 30 days from the conclusion of the Gleason trial, whichever was sooner.

The Gleason trial ended on January 23, 1979, and the stay was due to expire 30 days thereafter. On February 22, 1979, the last day of the stay, plaintiff by letter sought its further extension. Plaintiff advised the court that on January 10, 1979, during the course of the Gleason trial, an Assistant United States Attorney had asserted that plaintiff was the target of a grand jury investigation. Based on these considerations, the court was in effect requested to enter a protective order barring all discovery against Sindona until the latter's status was clarified by a determination by the government to seek the indictment of plaintiff or a decision to terminate the investigation. That request was denied, and the previously ordered stay was allowed to expire.

On March 19, 1979, an indictment was in fact handed down against plaintiff charging him with criminal conduct in connection with his operation of the FNB and FNY. He was arraigned on March 23, 1978, and is scheduled to go to trial before Judge Griesa on May 7, 1979. In addition, a suit brought by the Federal Deposit Insurance Corp. ("FDIC") and a shareholders derivative action, both in which Sindona is named a defendant, have been consolidated in the Eastern District of New York for pretrial purposes.

Sindona's deposition in the instant suit was noticed by defendants for March 6, 1979. He appeared at the deposition but refused, upon Fifth Amendment grounds, to answer any questions relevant to the allegations in the complaint. It was stated on the record that he would decline to answer any and all such questions and would

base his refusal on assertion of the same constitutional privilege.

Defendants move for an order requiring Sindona to testify at a newly noticed deposition and to produce all documents requested on penalty of having his pleadings struck and the complaint dismissed pursuant to sanctions accorded under Rule 37, F.R.Civ.P. Plaintiff opposes the motion, arguing that Sindona cannot be compelled to waive his constitutional privilege against self-incrimination or perhaps to state the position more accurately, plaintiff cannot be penalized for asserting his Fifth Amendment rights.

Discussion

The motion is granted. As I understand the relevant developed case law, in a situation such as this, where plaintiff has voluntarily come into court to assert claims against a defendant, he cannot utilize his constitutional privilege as a sword to frustrate that defendant's right to prepare a defense. The Fifth Amendment privilege against self-incrimination was intended as a shield to protect an individual from being compelled to incriminate himself, but that doctrine has no application here. *See General Dynamics Corp. v. Selb Manufacturing Co.*, 481 F.2d 1204, 1213-14 (8th Cir. 1973), *cert. denied*, 414 U.S. 1162 (1974); *Lyons v. Johnson*, 415 F.2d 540 (9th Cir. 1969); *Penn Communications Specialties, Inc. v. Hess*, 65 F.R.D. 510 (E.D. Pa. 1975); *Bramble v. Kleindienst*, 357 F. Supp. 1028 (D. Colo. 1973), *aff'd sub nom. Bramble v. Richardson*, 498 F.2d 968 (10th Cir.), *cert. denied sub nom. Bramble v. Saxbe*, 419 U.S. 1069 (1974); *Brown v. Ames*, 346 F. Supp. 1176 (D. Minn. 1972).

Most recently, the issue was raised in this court in *Ferrin v. Sweeney*, 74 Civ. 4168, decided February 26, 1978 (Gagliardi, J). There, dismissal of the action was sought

because plaintiff, claiming the Fifth Amendment privilege against self-incrimination, declined to answer defendants' interrogatories. Judge Gagliardi held that the constitutional privilege could not be used to frustrate discovery by defendants. He found the interrogatories were relevant and proper. Accordingly, he ordered the complaint dismissed unless plaintiff served and filed answers to the interrogatories within 30 days.

Lefkowitz v. Cunningham, 431 U.S. 801 (1977); *Spevack v. Klein*, 385 U.S. 511 (1967); and *Garrity v. New Jersey*, 385 U.S. 493 (1967) cited by plaintiff are inapposite. Those cases stand for the proposition that a defendant may not be punished by loss of job (*Garrity*), disbarment (*Spevack*) or loss of political office (*Lefkowitz*) for asserting his constitutional rights. Nor are other cases cited of much assistance to plaintiff. In *Clark v. Lutcher*, 77 F.R.D. 415 (M.D. Pa. 1977), the court made no definitive ruling. It refused to delay the deposition of the plaintiff until after the latter's criminal trial on the ground that plaintiff had no constitutional right not to be put to the choice of whether to assert his Fifth Amendment privilege. The court said that at the deposition, the plaintiff could "object to answering any questions which he believes intrudes into the protected area." *Id.* at 417.

There are two decided cases, however, that appear to support the plaintiff's position. One, *Justice v. Laudermilch*, 78 F.R.D. 201 (M.D. Pa. 1978) is squarely on point in plaintiff's favor. There the court upheld the plaintiff's refusal to answer questions put to him during pretrial deposition on grounds of Fifth Amendment privilege. The court acknowledged that there were cases contrary to his holding but stated that they did "not appear to us to be the law." *Id.* at 203.

In *Gulf Oil Corp. v. Tug Kate Malloy*, 291 F. Supp. 816 (E.D. La. 1978), a libel action, the pilot asserted his

Fifth Amendment privilege and refused to answer questions put to him by a United States Coast Guard investigator. Similarly, at a pretrial deposition in the libel action he refused for the same reason to answer the questions of the libelant's attorney. The court upheld the assertion of the privilege and refused to order the pilot to respond to libelant's questions, holding that the right to invoke the privilege against self-incrimination is not dependent upon the nature of the proceedings but whether "the answer might tend to subject one to criminal responsibility." *Id.* at 817.

The *Gulf Oil Corp.* case can be distinguished from the instant case, however, since the pilot there was not a party to the libel proceedings. He was merely a witness. Therefore other considerations may justify the result reached. I cannot, however, distinguish *Justice* from the issue under consideration, but since I believe it was wrongly decided, I refuse to follow it.

Plaintiff here places emphasis on the language in the cases opposed to his position that would seem to indicate that as a requisite for the relief sought here a plaintiff must be totally recalcitrant and refuse to answer all questions. Judge Gagliardi seemed to regard that as a factor in *Ferrin*. I do not believe that a refusal to answer all questions is a necessary prerequisite to the relief defendants seek; refusal to answer questions relevant to the defense is enough. The defendants here are entitled to answers to questions that meet the standard of relevance in pretrial proceedings.

Accordingly, I hold that since Sindona brought this action and is voluntarily using the court process to assert a right of action against the defendants, he cannot use the Fifth Amendment privilege to bar defendants from access to evidence relevant to their defense. Similarly, plaintiff is not entitled to a stay of discovery because he is under indictment and scheduled to go on trial. He is required to

respond to relevant questions put to him by defendants orally or by written interrogatories and to furnish documents on a proper request.

The parties may set a mutually agreeable date for the rescheduling of plaintiff's deposition and production of the desired documents. Should plaintiff refuse to answer questions put at his deposition or refuse to produce the requested documents, on being satisfied that the questions and requested documents are relevant to defendants' pretrial discovery, the court will order the action dismissed with prejudice.

IT IS SO ORDERED.

Dated: New York, New York
April 6, 1979

ROBERT L. CARTER
U.S.D.J.

APPENDIX D

MICHELE SINDONA v. LAURENCE A. TISCH, LAWTON GENERAL CORPORATION, LOEW'S THEATRES, INC., TISCH HOTELS, INC., LOEW'S CORPORATION, LOEW'S HOTELS, INC.

78 Civ. 3102 (RLC)

ENDORSEMENT

Plaintiff, Michele Sindona, moves for a protective order temporarily halting defendant's effort to depose him pending completion of a criminal case in which he is named as an unindicted co-conspirator. That case, *U.S. v. Gleason, et al.*, 78 Cr. M. 8522, was commenced on November 27, 1978, before Judge Griesa of this court. Defendants cross-move for an order compelling discovery or in the alternative for the sanction of dismissal.

Since late 1974, plaintiff has been under investigation by a federal grand jury in connection with the failure of the Franklin National Bank. No indictment against him has yet been filed. Sindona asserts that the proposed deposition in the present civil action is likely to touch upon matters relevant to the ongoing investigation, and the absence of an indictment informing him of the scope of the investigation prejudices his ability to exercise intelligently his privilege against self-incrimination. This dilemma, he argues, can be easily remedied by an order forstalling discovery until such time as the nature of the charges likely to be brought against him becomes clear from evidence adduced at the trial of his alleged co-conspirators.

Defendants strenuously object to Sindona's proposed 90 day protective order. They point out that extradition

proceedings are currently pending against Sindona. Should he become unavailable for discovery, however, the sanction of dismissal may be invoked at that time. Defendants also argue that additional delay may result in documents' becoming harder to trace and witnesses' recollections fading. Such effects attributable to a several week delay must surely be *de minimis*. Quite frankly, it is difficult for the court to see how defendants would be at all prejudiced by a short stay.

Whether Sindona seeks cessation of *all* discovery or only a 90 day prohibition against his being deposed was a source of some confusion in the motion papers. Under the circumstances, a stay temporarily barring defendants from taking Sindona's pre-trial testimony is all that is warranted. Also, since plaintiff asked for a 90 day stay before the criminal trial was commenced and that case has already proceeded for six weeks, it is clear that plaintiff's respite need not extend a full 90 days from the date of this order.

For the above reasons, plaintiff's motion for a protective order is granted, such order to expire either 90 days from the date of this order or 30 days after the conclusion of the trial in *U.S. v. Gleason, et al.*, whichever is sooner.

IT IS SO ORDERED.

Dated: New York, New York
January 8, 1979

ROBERT L. CARTER
U.S.D.J.

APPENDIX E

MICHELE SINDONA v. LAURENCE A. TISCH, LAWTON GENERAL CORPORATION, LOEW'S THEATRES INC., TISCH HOTELS, INC., LOEW'S CORPORATION, LOEW'S HOTELS, INC.

78 Civ. 3102

ENDORSEMENT

On April 6, 1979, the court filed a memorandum opinion and order requiring plaintiff "to respond to relevant questions put to him orally or in written interrogatories and to furnish documents on a proper request" and that in the event he failed or refused to do so, on a satisfactory showing that "the questions and requested documents are relevant to defendants' pre-trial discovery," the action would be dismissed with prejudice.

Pursuant to the court's memorandum, the resumption of plaintiff's aborted deposition was scheduled on April 27, 1979, and responses to defendant's first request for production of documents was set for April 26, 1979. On this latter date, counsel for plaintiff advised counsel for defendants that plaintiff would continue to refuse to produce documents sought in defendants' first request.

On April 27, 1979, plaintiff appeared for his deposition. He and his counsel indicated on the record that plaintiff had been apprised of the court's memorandum and order, and understood its meaning and implications. Nonetheless, as to each question put by defendants, plaintiff refused to answer claiming a Fifth Amendment privilege. Finally, plaintiff's counsel made clear that plaintiff would continue to refuse to respond to all

questions put at the deposition. A reading of the deposition conclusively establishes that each of the questions put were germane and relevant for the purpose of defendants' pre-trial discovery, and as stated in the memorandum of April 6, plaintiff is required to respond to all such questions. He has no Fifth Amendment protection shielding him from the penalties which may be imposed under Rule 37, F.R.Civ.P. against a recalcitrant party. *See General Dynamics Corp. v. Selb Manufacturing Corp.*, 481 F.2d 1204, 1213-14 (8th Cir. 1973), *cert. denied*, 414 U.S. 1162 (1974).

Defendants move for an order dismissing this action with prejudice. For the reasons stated in my memorandum of April 6, 1979, they are entitled under Rule 37, F.R.Civ.P. to such relief and, accordingly, the motion to dismiss the complaint herein with prejudice is granted.

SETTLE ORDER.

Dated: New York, New York
May 24, 1979

ROBERT L. CARTER
U.S.D.J.

Supreme Court, U. S.
FILED
MAR 31 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1337

MICHELE SINDONA,

Petitioner,

v.

LAURENCE A. TISCH, LAWTON GENERAL CORPORATION, LOEW'S THEATRES INC., TISCH HOTELS, INC., LOEWS CORPORATION, LOEW'S HOTELS, INC.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Respondents Laurence A. Tisch, Lawton General Corporation, Loew's Theatres Inc., Tisch Hotels, Inc., Loews Corporation and Loew's Hotels, Inc. submit this Brief in opposition to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit of petitioner Michele Sindona.

Question Presented

Did the Court of Appeals correctly hold that, on the facts and circumstances of this case, the plaintiff—who is himself the critical witness in this action—could not continue to maintain his action, brought on the last day of a six-year statute of limitations, while refusing to answer any deposition questions or produce documentary evidence on the basis of a claim of Fifth Amendment privilege?

Statement of the Case

Plaintiff-petitioner Michele Sindona ("Sindona") commenced this action in the United States District Court for the Southern District of New York on July 10, 1978, the last day prior to the expiration of the applicable six-year statute of limitations. The complaint charged that defendants-respondents ("respondents") — Loews Corporation, certain of its present and former subsidiaries and affiliates and Laurence A. Tisch, its chief executive officer—made "fraudulent omissions" and misrepresentations of fact concerning the condition of Franklin New York Corporation and of its subsidiary Franklin National Bank during negotiations which culminated in a sale in July 1972 of Franklin shares by two Loews subsidiaries to a company wholly owned by Sindona.*

Shortly after Sindona's action was filed, respondents—who contend that Sindona's allegations of fraud are spurious—served him with a notice of deposition and request for document production. Sindona produced a few largely irrelevant documents (previously ordered produced to the Securities and Exchange Commission in another action), but objected to further production of all categories of documents requested, claiming the privilege against self-incrimination. The apparent basis for the assertion of privilege was that Sindona had been informed by the United States Attorney for the Southern District of New York that he was the target of a criminal investigation relating to his activities at Franklin.

Rather than appear for his deposition, Sindona moved for a protective order "staying all discovery against [him]

* Except where differentiation is necessary, this Brief will use "Franklin" to refer to both Franklin New York Corporation and its banking subsidiary.

for a period of ninety (90) days" on the stated ground that an upcoming trial against certain other former Franklin officers, *United States* v. *Gleason, et al.*, 78 Cr. 522 (TPG) (S.D.N.Y.), would clarify the status of any criminal investigation of him. The District Court granted the stay, over respondents' objection, specifying that its duration would be "90 days from the date of [the] order or 30 days after the conclusion of the trial in *U.S.* v. *Gleason, et al.* whichever is sooner." The Court concluded that a stay of such limited duration would not be prejudicial to respondents.

On the very day the stay expired, Sindona's counsel applied for an extension of the stay. Respondents opposed on the basis of their previously expressed position that Sindona was in reality seeking an indefinite stay of discovery—to respondents' manifest prejudice. District Judge Carter, recognizing the prejudice to respondents which would result from the essentially open-ended stay now being sought by Sindona, denied Sindona's application in a letter to Sindona's counsel which, notably, does not appear among the exhibits to the Petition:*

> I am somewhat disturbed by your request of February 22, because it tends to confirm defendants' suspicion that you are really seeking an indefinite stay of discovery and makes manifest that it was a mistake to grant your initial request. At any rate, the defendants should not be under any indefinite prohibition against proceeding with discovery, particularly in a case where your client has initiated the litigation.
>
> My order of January 8th past has now expired on its own terms and the court does not propose further

* Judge Carter's letter is submitted as Exhibit A, Addendum hereto.

to interfere with defendants' right to depose your client.

On March 6, 1979, Sindona appeared for his deposition. After providing his name and address and identifying himself as the plaintiff, Sindona refused, on Fifth Amendment grounds, to answer each and every question put to him, including inquiries concerning the factual basis for his own complaint. For example:

> Q. Did you personally have any communication with Laurence A. Tisch of Loew's Corporation or any other representative of Loew's Corporation prior to July 11, 1972, with respect to any transaction involving a sale or purchase of shares of Franklin New York Corporation?
>
> A. The same answer. I decline to answer.

Sindona's counsel expressly stated that Sindona would continue to assert the privilege against self-incrimination as to *all* relevant questions.

On April 6, 1979, upon respondents' motion to compel discovery, the District Court issued an opinion and Order reviewing the pertinent authorities and requiring Sindona to comply with respondents' relevant discovery requests or face dismissal of his action. See Appendix C to Petition. During the pendency of respondents' motion, on March 19, 1979, Sindona had been indicted for activities relating to Franklin.*

On April 27, 1979, Sindona again appeared for his deposition. After Sindona's counsel acknowledged that Sindona

* The charges in the Southern District of New York indictment against Sindona related to only two of the numerous issues in this civil action: whether the $40 million he paid Loews subsidiaries for Franklin stock was actually his; and whether Sindona's own unlawful acts at Franklin were the ultimate cause of Franklin's demise and the alleged loss of his investment in Franklin.

was fully cognizant of the District Court's Order, counsel for respondents sought to put questions going to the material issues in Sindona's action: fraud, reliance, causation, damages. Sindona declined, on Fifth Amendment grounds, to answer each and every question. The deposition concluded with the concession by Sindona's counsel that Sindona would persist in his refusal to answer any and all relevant questions put to him or to produce documents.

Upon motion by respondents, the District Court then dismissed Sindona's action. An Order and Judgment dismissing the case was entered on June 7, 1979.

Sindona appealed to the United States Court of Appeals for the Second Circuit which, on October 31, 1979, unanimously affirmed the District Court's decision.* The Court of Appeals recognized the patent unfairness to respondents of requiring them to wait indefinitely for an opportunity to obtain relevant evidence from the plaintiff—the most crucial witness in the action—in a case relating to a transaction almost seven years old at the time of dismissal:

> In the instant case, plaintiff's right to invoke the Fifth Amendment must be weighed against the injustice to the civil defendants. In that regard this case is distinguishable from recent Supreme Court decisions guaranteeing the right to invoke the Fifth Amendment without penalty. *See Spevack* v. *Klein,* 385 U.S. 511 (1967); *Garrity* v. *New Jersey,* 385 U.S. 493 (1967); *Lefkowitz* v. *Cunningham,* 431 U.S. 801 (1977). In view of the fact that plaintiff Sindona refused to answer any

* The Second Circuit's opinion was in the form of a brief written statement appended to a summary order of affirmance. Such opinions are unreported and "shall not be cited or otherwise used in unrelated cases before [the Second Circuit] or any other court." See United States Court of Appeals for the Second Circuit, Rules Relating to the Organization of the Court § 0.23.

substantive questions during discovery, we hold that the district court correctly concluded that the balance of justice here tipped in favor of protecting the civil defendants. . . .

We hold that the district court did not abuse its discretion in either denying Sindona's motion for a stay of discovery procedures or dismissing the complaint. Again, the court weighed the possible injustice to the civil defendants against plaintiff's need for protection, and decided that the scales tipped in defendants' favor. The court had sound reasons for acting as it did.

• • •

Both the District Court and the Court of Appeals recognized that dismissal was the only viable alternative under the particular facts and circumstances of this case. For any further delay would have been highly prejudicial to respondents—already in the unenviable position of having to defend against alleged multi-million dollar fraud claims based on oral negotiations which took place in 1972. As will be shown herein, any court faced with similar facts and circumstances would have likewise properly decided in favor of dismissal. Consequently, review of this case by this Court is unwarranted.

REASONS FOR DENYING THE WRIT

This case is distinguishable on its facts from the allegedly conflicting decisions cited by petitioner. It was decided correctly and in accord with the decisions of this Court.

There is no conflict among the circuits as to the power of a District Court to dismiss an action on the basis of a plaintiff's refusal, on Fifth Amendment grounds, to make discovery. All Courts of Appeals which have confronted this issue—including those in the cases relied on by petitioner Sindona—have recognized that dismissal is, in appropriate circumstances, an entirely proper remedy for defendants deprived of discovery by a plaintiff's assertion of the Fifth Amendment privilege.*

It may be noted that earlier this Term this Court denied a Petition for a Writ of Certiorari of civil plaintiffs whose complaint had been dismissed by a state court for their refusal, on Fifth Amendment grounds, to make discovery. *Galante* v. *Steel City National Bank,* 66 Ill. App. 3d 476, 384 N.E.2d 57 (App. Ct. 1978), *cert. denied,* 100 S. Ct. 80 (Oct. 1, 1979). The petitioners in *Galante,* like Sindona, argued that the decision of the lower court was contrary to the precedents of this Court.

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* In addition to the instant case and the cases cited by petitioner (which are discussed herein), see, *e.g., Lyons* v. *Johnson,* 415 F.2d 540, 541-42 (9th Cir. 1969), *cert. denied,* 397 U.S. 1027 (1970); *General Dynamics Corp.* v. *Selb Manufacturing Co.,* 481 F.2d 1204, 1213-14 (8th Cir. 1973), *cert. denied,* 414 U.S. 1162 (1974); *Bramble* v. *Kleindienst,* 357 F. Supp. 1028, 1035-36 (D. Colo. 1973), *aff'd sub nom. Bramble* v. *Richardson,* 498 F.2d 968, 973 (10th Cir.), *cert. denied sub nom. Bramble* v. *Saxbe,* 419 U.S. 1069 (1974); *Kisting* v. *Westchester Fire Insurance Co.,* 290 F. Supp. 141, 149 (W.D. Wis. 1968), *aff'd on opinion below,* 416 F.2d 967 (7th Cir. 1969).

The propriety of dismissal thus must turn upon the circumstances of the particular case. The facts of this particular case which establish the propriety of dismissal include the following:

1. The Courts below were faced with a total refusal by Sindona to give any deposition testimony whatsoever;*
2. Sindona's refusal to give any deposition testimony was coupled with a virtually total refusal to make any document production;
3. There was no suggestion that respondents were in any way acting in concert with the Government. Indeed, in the District Court, Sindona ignored the possibility—raised by respondents—of submitting to discovery subject to a confidentiality order shielding Sindona's testimony and documents from being made available to the Government. At oral argument, the Court of Appeals itself suggested that Sindona submit to discovery subject to such a confidentiality order. Sindona's counsel declined;

*Not only was this wholesale refusal by its very nature of dubious validity given the requirement long imposed by law that the claim of privilege be asserted on a question-by-question basis, see, *e.g.*, *United States* v. *Pierce*, 561 F.2d 735, 741-42 (9th Cir. 1977), *cert. denied*, 435 U.S. 923 (1978); *United States* v. *Malnik*, 489 F.2d 682, 685-86 (5th Cir.), *cert. denied*, 419 U.S. 826 (1974); *General Dynamics Corp.* v. *Selb Manufacturing Co.*, 481 F.2d 1204, 1212, 1213 (8th Cir. 1973), *cert. denied*, 414 U.S. 1162 (1974); *United States* v. *Solon*, 294 F. Supp. 880, 882 (E.D.N.Y.), *aff'd*, 405 F.2d 1211 (2d Cir. 1968); *United States ex rel. Laino* v. *Warden of Wallkill Prison*, 246 F. Supp. 72, 80 (S.D.N.Y. 1965), *aff'd*, 355 F.2d 208 (2d Cir. 1966), but it was by no means factually clear that all areas of potential inquiry—as to the issues raised by a complaint claiming that Sindona was a *victim* of "fraud" supposedly committed by others—would necessarily have been self-incriminating in nature.

4. The action was not brought by Sindona until the last day of a six-year limitation period. Having commenced the action, Sindona then repeatedly sought stays of the District Court and, when ultimately refused further stay, refused to make discovery;*
5. Sindona himself was the single critical witness who had personally negotiated the transaction at issue with respondents and had unique knowledge of the facts. The record showed that it was impossible for respondents to ascertain Sindona's claims and investigate their defense without the benefit of his testimony. When dismissed, the case related to events which were seven years old. Further delay would have continued to compound the prejudice to respondents;**

*Petitioner's counsel likewise repeatedly sought to delay the proceedings in the Court of Appeals, requesting—on the ground that Sindona had disappeared and had apparently been kidnapped—an indefinite suspension of the appeal "pending clarification of Mr. Sindona's whereabouts and status," *e.g.*, Petitioner's Second Circuit Brief, pp. 1-2, n.1. Documentation since presented by the Government during Sindona's criminal trial indicated that Sindona's "kidnapping" story had been a hoax and that Sindona, in fact, had travelled to Europe under an assumed name. See N.Y. Times, March 7, 1980, § 2, at 2, col. 3.

**The statement in Sindona's petition that "[r]espondents did not make any factual showing in the district court that a stay of discovery would prejudice their defense of this action" is incorrect. See Petition, p. 14. Respondents repeatedly emphasized below that they would indeed be prejudiced by extensive delay in a case whose central facts were already six years old when finally commenced, where the substance of oral negotiations would be the main focus of the case and where witnesses' memories were likely to fade significantly as more and more time went by. See, *e.g.*, Affidavit of Herbert M. Wachtell, sworn to December 4, 1978 ¶¶ 6-9; Respondents' Memorandum of Law, dated December 4,

6. Sindona's refusal to make discovery, given his unique status as a witness, brought the litigation to an effective halt. Indeed, it was conceded on behalf of Sindona in the Court of Appeals that his refusal to testify made it impossible for any trial to go forward. Petitioner's Second Circuit Reply Brief, p. 8;*

7. Sindona's claim of "fraud" had been asserted against highly reputable corporate and individual persons who, because of his refusal to give testimony, were being deprived of *their* right to have a prompt adjudication of its lack of merit before "memories have faded, witnesses have died or disappeared, and evidence has been lost";**

1978, p. 13. See also Respondents' Second Circuit Brief, pp. 29-30, 39-41.

As respondents pointed out below, Sindona's refusal to make discovery prevented them from learning the very nature of the "fraud" being alleged; from ascertaining the identity of persons having pertinent knowledge; from discovering the existence of documentary evidence. Respondents simply could not meaningfully begin their task of locating witnesses and documents to rebut plaintiff's claims—whatever they might have been—without first knowing Sindona's own story.

* Prior to Sindona's refusal to testify, the District Court had issued a Pre-Trial Schedule Order requiring that *all* discovery in the action be completed by April 30, 1979. Sindona's refusal to testify had the effect of rendering this Order a nullity and, if countenanced, would have permitted Sindona to arrogate to himself an indeterminate stay of proceedings—the very stay which had been denied by the District Court. It has of course long been settled that a District Court has virtually unfettered discretion to control its own calendar and to dismiss an action for want of prosecution. See, *e.g.*, *Link* v. *Wabash R.R. Co.*, 370 U.S. 626, 630-31 (1962). See also *National Hockey League* v. *Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 642 (1976).

** *Chase Securities Corp.* v. *Donaldson*, 325 U.S. 304, 314 (1945) (setting forth a rationale underlying statutes of limitations). Indeed, in light of the concession on behalf of Sindona in the District Court that he intentionally refrained from commencing the action

8. There was "no light at the end of the tunnel." Although pointing to the then forthcoming criminal trial as a predicate for Sindona's refusal to testify, at no time was Sindona's counsel prepared to represent that Sindona would have any willingness to testify once that trial was completed. To the contrary, the record before the District Court showed Sindona's counsel asserting the categorical position that Sindona would not testify at a deposition in the action for so long as there was any jeopardy of a criminal prosecution relating to Franklin against him.* And when asked, upon oral argument before the Second Circuit, to state when his client would be willing to submit to discovery, Sindona's counsel declined to make any representation to the Court.

It was on these facts that the Courts below "concluded that the balance of justice here tipped in favor of protecting the civil defendants." Yet Sindona argues that because the Fifth Circuit reversed as "premature" a District Court's dismissal of a private libel action against CBS in *Wehling*

prior to the final day of the six-year limitation period for the very reason that he was *not* prepared to prosecute the case, Sindona's act in "commencing" the action was an empty formalism designed to toll the statute of limitations. In repeatedly asking for stays of proceedings, Sindona was in fact requesting a *de facto* extension of the statute of limitations itself.

* As respondents pointed out to the Court of Appeals, were the criminal trial to have ended in a hung jury, Sindona manifestly would not deem himself free from the potentiality of incrimination. And—as has now in fact eventuated, see N.Y. Times, March 28, 1980, § 1, at 1, col. 3—were Sindona convicted, he would no doubt appeal and continue to refuse to make discovery pending the outcome of that appeal (and any new trial which might be ordered). The Courts below were, therefore, being asked to countenance an indeterminate stay of proceedings in an action the events of which were already seven years old.

v. *Columbia Broadcasting System,* 608 F.2d 1084 (5th Cir. 1979), *reh. denied,* 611 F.2d 1026 (5th Cir. 1980), there is a conflict in the law between the Second and Fifth Circuits. This is not so. The two Courts applied a single, uniform legal standard — a balancing-of-interests approach — in reaching their ultimate decisions. The disparate results of the cases turned on the differing facts at bar.

Thus, the Fifth Circuit in *Wehling* held that the "balancing-of-interests approach ensures that the rights of both parties are taken into consideration before the court decides whose rights predominate" and expressly recognized that dismissal may indeed be warranted where "prejudice to defendant" is established.* 608 F.2d at 1088-89. The Second Circuit was in accord—holding in the instant case that "plaintiff's right to invoke the Fifth Amendment must be weighed against the injustice to the civil defendants."

The differing results of these two cases are explained by the following principal factual distinctions:

—In *Wehling,* the Fifth Circuit recognized that the criminal statute of limitations against the plaintiff (who had not been indicted) was to expire on September 1, 1980 —just eight months from the date of the Court's decision—and stayed discovery of potentially incriminatory material until that time. 608 F.2d at 1089. The Court expressly refused to stay discovery for the duration of any criminal proceeding against the plaintiff, recognizing that any such stay could be of indeterminate duration—to the distinct prejudice of the civil

* Indeed, less than two months before deciding *Wehling,* the Fifth Circuit ruled that under certain circumstances it would be permissible to enter a default judgment against a civil defendant who has asserted his Fifth Amendment privilege as to all deposition questions. *United Artists Corp.* v. *Freeman,* 605 F.2d 854, 857 (5th Cir. 1979).

defendant.* When the instant case was dismissed—seven years after the relevant facts—an indictment had just been brought against Sindona and there was no indication when, if ever, the criminal charges against him would be finally resolved (given the likelihood of adjournments of trial, appeals, hung juries and retrials, further indictments, etc.). In fact, as noted above, there was no assurance from Sindona's counsel that Sindona would make discovery even after the final determination of the present criminal charges against him;

—In *Wehling,* the plaintiff did make relevant discovery, but objected to 19 particular deposition questions and refused to testify as to one area of inquiry. 608 F.2d at 1086. Here, Sindona refused, in a wholesale fashion, to answer any deposition questions whatever and likewise refused to make production of documents. All federal courts which have dealt with the total refusal of a plaintiff (or counterclaiming defendant) to make relevant discovery have ruled that dismissal is appropriate under such circumstances. *Lyons* v. *Johnson,* 415 F.2d 540, 541-42 (9th Cir. 1969), *cert. denied,* 397

* Thus, in denying a petition for rehearing, the Fifth Circuit expressly held that dismissal *would* be warranted upon further delay attributable to the plaintiff's continued assertion of privilege during the pendency of criminal proceedings:

> Our opinion must not be read as requiring that the discovery stay be extended until the termination of all criminal proceedings, regardless of their duration. Although we have refused to presume that a three-year stay [commencing two years after the facts in issue] would necessarily prejudice CBS' efforts to defend against Wehling's [libel] claim, *we are aware that a point may be reached where the likelihood of prejudice is so great that the trial court would be justified in requiring plaintiff to either submit to discovery or forego his lawsuit.*
>
> —611 F.2d at 1027-28, n.* (emphasis supplied).

U.S. 1027 (1970); *General Dynamics Corp.* v. *Selb Manufacturing Co.*, 481 F.2d 1204, 1213-14 (8th Cir. 1973), *cert. denied*, 414 U.S. 1162 (1974); *Jones* v. *B.C. Christopher & Co.*, 466 F. Supp. 213, 224-27 (D. Kan. 1979). See also *Galante* v. *Steel City National Bank*, 66 Ill. App. 3d 476, 384 N.E.2d 57 (App. Ct. 1978), *cert. denied*, 100 S. Ct. 80 (Oct. 1, 1979); and

—In *Wehling*, there was strong evidence that defendant CBS had been actively cooperating with the Federal Government, in its efforts to prosecute the civil plaintiff, and with the Attorney General of Texas. 608 F.2d at 1086 & n.4. Thus, to permit discovery of plaintiff to go forward would have been tantamount to permitting *government* to compel testimony. In the instant action, this was simply not the case—there was never any intimation below that respondents were acting in conjunction with the Government and, indeed, they were not.

The other cases claimed by Sindona to "conflict" are also distinguishable. Thus, in *Campbell* v. *Gerrans*, 592 F.2d 1054 (9th Cir. 1979), the Court held that dismissal was inappropriate where the plaintiff asserted the Fifth Amendment privilege as to only four (of 34) interrogatories which the Court found "were of a highly questionable nature and appear on their face to raise Fifth Amendment problems." 592 F.2d at 1057. Clearly, the progress of the entire action in *Campbell* was not brought to a grinding halt as it was in the instant case by Sindona's wholesale refusal to make discovery. Indeed, the Ninth Circuit acknowledged the limited nature of its ruling in *Campbell* by expressly distinguishing *Lyons* v. *Johnson*, 415 F.2d 540 (9th Cir. 1969), *cert. denied*, 397 U.S. 1027 (1970), in which that same Court upheld the dismissal of an action for a plaintiff's "unyielding" and absolute refusal to testify. 592 F.2d at 1057. *Justice* v. *Laudermilch*, 78 F.R.D. 201 (M.D. Pa. 1978), in which only 13 isolated deposition questions were objected to by the plaintiff, is similarly distinguishable from the case at bar.

Moreover, the Second Circuit's decision here is fully in accord with the decisions of this Court. In support of his position, Sindona has sought to rely upon the line of cases commencing with *Garrity* v. *New Jersey*, 385 U.S. 493 (1967) and *Spevack* v. *Klein*, 385 U.S. 511 (1967).* However, in such cases, the inquisitor was *government itself*, seeking to compel incriminating testimony—in *Garrity*, in an investigative inquiry against police officers; in *Spevack*, in a disciplinary hearing against an attorney—and as this Court has subsequently made clear, it was that particular role of the *state* in actively initiating an attempt to compel incriminating testimony "by threats of serious economic reprisal" ** that is the basis of the *Garrity* line of cases. Those decisions thus lie close to the very core of the Fifth Amendment privilege—a privilege designed "to protect the individual in what was thought to be an unequal contest with the state," *United States* v. *Solomon*, 509 F.2d 863, 868 (2d Cir. 1975) (Friendly, J.)—and reflect understandable sensitivity to attempts by *government* as inquisitor to perform an end-run around the Fifth Amendment by imposing "devastating" penalties*** upon an involuntary witness if

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* See also *Gardner* v. *Broderick*, 392 U.S. 273 (1968); *Uniformed Sanitation Men Association* v. *Commissioner of Sanitation*, 392 U.S. 280 (1968); *Lefkowitz* v. *Turley*, 414 U.S. 70 (1973); and *Lefkowitz* v. *Cunningham*, 431 U.S. 801 (1977).

** *Baxter* v. *Palmigiano*, 425 U.S. 308, 316-17 (1976).

*** See *United States* v. *Solomon*, 509 F.2d 863, 871 (2d Cir. 1975).

he refuses to waive his constitutional privilege and incriminate himself.*

The present case is quite different. For while it has of course been held that a party to a private civil action has the right to refuse to answer particular questions which may be incriminatory of him in some other proceeding, we are now at the penumbra of the Fifth Amendment's scope. Given a case such as that which is the subject of the present petition—where government is *not* the inquisitor; where critically relevant testimony is being sought by purely private adversaries in a civil litigation (*a fortiori*, adversaries who have involuntarily been thrust into that litigation as *defendants* by the very party who refuses to make discovery); where there is no suggestion that such adversaries are acting as a "stalking horse" for government—the Courts below quite properly recognized that respondents in this private civil case have rights which likewise are deserving of judicial recognition and protection and that this Court's precedents did not render a District Court powerless to grant necessary and appropriate relief. Nor is the dismissal of petitioner's lawsuit for failure to meet his normal obligations as a litigant on the same par as the penalty of loss of livelihood with which this Court was faced in cases such as *Garrity* and *Spevack*.**

• • •

* See, *e.g.*, *Gardner* v. *Broderick*, 392 U.S. 273 (1968) (dismissal of public employee *would* be permissible for refusal to "answer questions specifically, directly, and narrowly relating to the performance of his official duties"; vice was requirement "to waive his immunity with respect to the use of his answers or the fruits thereof in a criminal prosecution of himself"; it was "clear that petitioner's testimony was demanded before the grand jury in part so that it might be used to prosecute him, and not solely for the purpose of securing an accounting of his performance of his public trust." 392 U.S. at 278, 279.).

** Petitioner's reliance on certain other decisions of this Court is also misplaced. Thus, in *Societe Internationale* v. *Rogers*, 357 U.S. 197, 208-13 (1958), this Court held it unconstitutional to dismiss the action of a plaintiff for his refusal to produce documents. There, however, the plaintiff was "unable" to produce such documents since "compliance by disclosure of banking records [would have] itself constitute[d] the initial violation of Swiss laws." *Id.* at 211. The Court expressly distinguished the more pertinent factual setting in which the plaintiff is required to submit to discovery notwithstanding claims that compliance "will reveal facts which may provide the basis for criminal prosecution." *Id.*

In *United States* v. *Kordel*, 397 U.S. 1 (1970), the Court upheld the convictions of two officers of a corporation, where the District Court correctly decided *not* to stay a related civil proceeding pending completion of the criminal case. That decision, notwithstanding dicta cited by petitioner, provides no basis for the position of a plaintiff refusing all discovery on Fifth Amendment grounds.

In sum, neither this Court nor any Court of Appeals has ever held that a court lacks *power* to dismiss the complaint of a civil plaintiff refusing discovery on Fifth Amendment grounds. Here, the Second Circuit simply held that, on the particular facts and circumstances of this case, that power of the District Court was properly exercised.* There is no conflict among the circuits nor is the Second Circuit's decision in conflict with any prior precedent of this Court. Accordingly, the petition should be denied.

* See also *National Hockey League* v. *Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 642 (1976), a non-Fifth Amendment case, in which the Court, noting the discretionary nature of the District Court's decision, affirmed dismissal of the action of a plaintiff for his disobedience of a discovery order. In that decision, the Court relied upon the Eighth Circuit's decision in *General Dynamics Corp.* v. *Selb Manufacturing Co.*, 481 F.2d 1204 (8th Cir. 1973), *cert. denied*, 414 U.S. 1162 (1974), which expressly upheld the dismissal of the compulsory counterclaim of a defendant asserting the Fifth Amendment privilege.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari of Michele Sindona should be denied.

Dated: New York, New York
March 31, 1980

Respectfully submitted,

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ADDENDUM

Exhibit A

UNITED STATES DISTRICT COURT
CHAMBERS OF
JUDGE ROBERT L. CARTER
UNITED STATES COURTHOUSE
FOLEY SQUARE
NEW YORK, N. Y. 10007

February 26, 1979

Laurence V. Senn, Jr., Esq.
Mudge Rose Guthrie & Alexander
20 Broad Street
New York, New York 10005

RE: Sindona v. Tisch, et al, 78 Civ. 3102

Dear Mr. Senn:

I am somewhat disturbed by your request of February 22, because it tends to confirm defendants' suspicion that you are really seeking an indefinite stay of discovery and makes manifest that it was a mistake to grant your initial request. At any rate, the defendants should not be under any indefinite prohibition against proceeding with discovery, particularly in a case where your client has initiated the litigation.

My order of January 8th past has now expired on its own terms and the court does not propose further to interfere with defendants' right to depose your client.

Sincerely,

Robert L Carter

ROBERT L. CARTER

cc: Steven M. Barna, Esq.